

REMARKS

Applicants have thoroughly considered the Examiner's remarks in the September 17, 2008 Office action. Applicants have amended claims 1, 17, and 32 in this Amendment D for clarity. Claims 2, 18, and 33 were previously canceled. Claims 1, 3-17, 19-32, and 34-42 are pending.

Applicants appreciate the courtesies shown to Applicants' representative, Kevin Jones, by Examiner England in the December 15, 2008 telephonic interview. During the interview, Kevin Jones discussed aspects of the present invention and the Tunnicliffe and Datta references (US patent No. 6,272,110 B1 and US patent No. 6,209,033 B1) with Examiner England. In particular, independent claims 1, 17, and 32 were discussed with reference to the Tunnicliffe and Datta references. No demonstration was given, no agreement regarding patentability was reached, and no exhibit was shown. Applicants' record of the substance of the interview is incorporated into the following remarks.

Applicants respectfully request reconsideration of the claims as amended and in view of the following remarks. In particular, Tunnicliffe et al. is directed to defining a threshold which is the maximum bandwidth that a customer is allowed to use. The maximum is specified in a service level agreement, and is shown in FIG. 1 (see Tunnicliffe, col. 3, lines 22-55). However, Tunnicliffe fails to teach, suggest, or even mention comparing a predicted utilization of a network to a maximum and minimum acceptable utilization of the network at future times.

Further, Datta et al. discloses evaluating a present and future capacity of individual links that make up a network by

evaluating one of an upper bound or a lower bound capacity of each of the. However, Datta et al. fails to teach or suggest or even mention comparing a predicted utilization of a network to a maximum and minimum acceptable utilization of the network at future times.

I. Rejection of Claims 32 and 34-41 Under 35 U.S.C. 101

Claims 32 and 34-41 stand rejected under 35 U.S.C. 101 as being directed to non-statutory subject matter. In particular, the Examiner alleges that a "computer readable medium" as recited in claims 32 and 34-41 is not defined in the specification as being hardware or software. Thus, the Examiner alleges that a "computer readable medium" can be interpreted as solely software. Applicants respectfully disagree.

Claims directed toward a "computer readable medium" are well known in the art. In addition, a "computer readable medium" is well known to be hardware, and in particular a storage device such as a floppy disk or a compact disk. The Federal Circuit ruled in *In re Beauregard*; 53 F.3d 1583 (Fed. Cir. 1995) that a computer readable medium is considered patentable subject matter as it is an article of manufacture, e.g., a floppy disk.

For at least these reasons, Applicants submit that claims 32 and 34-41 satisfy the requirements of 35 U.S.C. 101. As such, reconsideration and withdrawal of the rejection under 35 U.S.C. 101 are respectfully requested.

II. Rejection of Claims 1, 3-17, 19-32 and 34-42 Under 35 U.S.C. 103(a)

Claims 1, 3-17, 19-32 and 34-41 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Tunnicliffe et al. (US patent No. 6,272,110 B1) in view of Datta et al. (US patent No. 6,209,033 B1). Applicants disagree, and submit that the cited references fail to teach or suggest, at the very least, comparing a predicted utilization of a network to a maximum and minimum acceptable utilization of the network at each future time.

Tunnicliffe et al. discloses a system in which a threshold value is defined that is indicative of the maximum amount of bandwidth that a customer is allowed to use in his network. A system predictor is configured to predict a time when network demand will exceed network capacity, a period of time during which the maximum network capacity will be exceeded, and a time when network demand will reduce below the maximum network capacity. Tunnicliffe et al., Column 3, lines 30-44; and Column 4, lines 52-59).

Datta et al. discloses evaluating a present and future capacity of individual links that make up a network by evaluating one of an upper bound or a lower bound capacity of each of the links that are either defined by a system administrator or predetermined.

In contrast, claim 1 of the present application is directed to comparing a predicted utilization of a network to a maximum and minimum acceptable utilization of the network at each future time.

Neither Tunnicliffe et al. nor Datta et al. describe nor suggest comparing a predicted utilization of a network to a

maximum acceptable utilization and minimum acceptable utilization so as to maintain the network utilization between the acceptable maximum and minimum. Nowhere in Tunnicliffe et al. or Datta et al. is the concept of comparing both a maximum and a minimum acceptable utilization even discussed. For example, the concept of a minimum acceptable utilization is not discussed in Column 3, lines 22-55 of Tunnicliffe et al. as suggested by the Examiner. The *maximum* threshold of Tunnicliffe et al. cannot be reasonably interpreted to teach or suggest a *minimum* acceptable network utilization of the present application at least because Tunnicliffe et al. is entirely focused on the maximum threshold.

Further, the Examiner alleges that Datta et al. discloses a maximum and minimum threshold evaluation at Column 3, lines 11-35. However, Datta et al. merely describes that at a future time a maximum or a minimum threshold of an individual link is evaluated, not both as is required in the present claims.

For at least these reasons, Applicants submit that independent claim 1 is patentable over the cited art. To the extent that independent claims 17 and 32 recite limitations similar to the limitations recited in claim 1, independent claims 17 and 32 are believed to be allowable for at least the same reasons that claim 1 is believed to be allowable.

Claims 2, 18, and 33 are cancelled.

Claims 3-16 depend from and further limit claim 1, and are allowable for at least the same reasons that claim 1 is allowable. Applicants request that the rejection of claims 3-16 be removed.

Claims 19-31 depend from and further limit claim 17, and are allowable for at least the same reasons that claim 17 is

allowable. Applicants request that the rejection of claims 19-31 be removed.

Claims 34-41 depend from and further limit claim 32, and are allowable for at least the same reasons that claim 32 is allowable. Applicants request that the rejection of claims 34-41 be removed.

Claim 42 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Westphal (US Publication No. 2004/0202160). However, claim 42 depends from and further limits claim 1, and is allowable for at least the same reasons that claim 1 is allowable. Applicants request that the rejection of claim 42 be removed.

III. Additional References Cited by the Examiner During the Interview

During the interview, Examiner England provided additional references for Applicants to consider that allegedly describe or suggest the present claims. In particular, the Examiner alleged that Ma et al. (U.S. Patent No. 5,953,338) and Yoshimura et al. (U.S. Publication No. 2003/0069972) disclose the feature of comparing a predicted utilization of a network to a maximum and minimum acceptable utilization of the network at each future time.

Neither Ma et al. nor Yoshimura et al. describe nor suggest comparing a predicted utilization of a network to a maximum acceptable utilization and minimum acceptable utilization so as to maintain the network utilization between the acceptable maximum and minimum. Nowhere in Ma et al. or Yoshimura et al. is the concept of comparing both a maximum and a minimum acceptable utilization at a future time even discussed. For example, Ma et al. merely describes background processes that

add a block of additional bandwidth when a maximum utilization threshold is exceeded in order to anticipate periods of over utilization and accommodate an extra bandwidth demand. Ma et al. further describes that the background processes may alternatively release a block of "borrowed" bandwidth when the load falls below a minimum utilization threshold. In addition, Yoshimura merely describes that a user condition setting includes a maximum and minimum bandwidth and a threshold value of a band utilization as well as a history of the bandwidth allocated to a user from the minimum bandwidth to the maximum bandwidth.

For at least these reasons, Applicants submit that independent claim 1 is patentable over the additional cited art. To the extent that independent claims 17 and 32 recite limitations similar to the limitations recited in claim 1, independent claims 17 and 32 are believed to be allowable for at least the same reasons that claim 1 is believed to be allowable.

For at least these reasons, Applicants submit that claims 1, 3-17, 19-32, and 34-41 are in condition for allowance.

Conclusion

Applicants submit that the claims are allowable for at least the reasons set forth herein. Applicants thus respectfully submit that claims 1, 3-17, 19-32, and 34-41 as presented are in condition for allowance and respectfully request favorable reconsideration of this application.

Although the prior art made of record and not relied upon may be considered pertinent to the disclosure, none of these references anticipates or makes obvious the recited aspects of the invention. The fact that Applicants may not have specifically traversed any particular assertion by the Office

should not be construed as indicating Applicants' agreement therewith.

The Commissioner is authorized to charge Deposit Account No. 12-384 for any fees incurred during the pendency of this application.

Respectfully submitted,

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